United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1269

UNITED STATES OF AMERICA,
Appellee,

—against—

JOHN McCLEAN, RAMON VIERA and
EDWARD CODELIA,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE

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Preliminary Statement

The appellants, John McClean, Ramon Viera and Edward Codelia, appeal from a judgment of conviction entered June 12, 1975 in the United States District Court for the Eastern District of New York (Weinstein, *J.*), after a jury trial convictng them on six counts of a seven count indictment. Four of the counts on which the appellants were convicted involved civil rights deprivations in violation of 18 U.S.C. § 242. The other two counts on which convictions were obtained involved illegal wiretapping in violation of 18 U.S.C. § 2511(1)(a) and (2). The appellants were acquitted on one of the illegal wiretapping charges (Count Six).

On June 12, 1975 appellants were sentenced to a term of imprisonment pursuant to 18 U.S.C. § 4208(a)(2). John McClean and Edward Codelia were sentenced to one year imprisonment each on counts one through four, to run consecutively, five years on counts five and seven, to run concurrently with each other and consecutively with counts one through four, and a fine of $10,000 on counts five and seven to run concurrently. Ramon Viera was sentenced to a term of imprisonment of one year on counts one through four, to run consecutively, five years on count five, to run consecutively with counts one through four, and a fine of $10,000 on count five. The sentence imposed was therefore a total of nine years in prison and a $10,000 fine for each defendant. The appellants are presently free on bail.

Statement of Facts

A. Introduction

This case involves an elite field unit of the New York City Police Department that, between 1969 and 1971, abandoned its law enforcement responsibilities and operated as lawlessly as any criminal organization. The appellants, all holding the rank of detective, were members of that unit during the period of the conspiracy and illegalities charged in the indictment. Apparently feeling that their services to the City of New York were insufficiently remunerated (771-772)* the appellants embarked on a course that led them to install illegal wiretaps and violate the civil rights of suspected narcotics dealers for the purpose of appropriating or extorting money. In one instance, after seizing money at gunpoint from a drug dealer, the appellants forced their victim to leave the country rather than arrest him and take the chance of being exposed.

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* Unless otherwise indicated references are to the transcript of the trial.

Nor was this corruption confined to one field unit; although the instant convictions involved only three detectives, the record clearly shows that the appellants were operating in the context of police lawlessness that permeated the entire Special Investigations Unit, a key investigatory arm of the Bureau of Narcotics of the New York City police force. In fact, the testimony of those police officers who had formerly participated in the corruption and now are cooperating with the United States, indicated that the major drug investigations and arrests conducted by the Special Investigations Unit were accompanied by thievery and extortion on the part of the involved police officers (694-698, 871-887).

The appellants' illegalities are best examined by beginning with a brief description of the Special Investigations Unit.

B. The Special Investigations Unit

Until recently one of the most elite law enforcement units in the New York City Police Department was the Special Investigations Unit (SIU) of the Bureau of Narcotics. The SIU was responsible for initiating narcotics investigations and making arrests of high level drug dealers (650-651). Admission into the SIU, particularly the field teams, was highly selective. Those police officers, mainly detectives, who joined the field units had extensive experience in drug investigations and generally had been recommended to the SIU by their current commanding officer (649). The supervisory officers in the SIU were often future prospects for top-level command positions in the New York City Police Department. In short, an assignment with the SIU was one of the most prestigious, responsible and, as will be shown, lucrative positions that a field detective or supervisory officer could attain in the New York City police force.

During the pendency of the appellants' conspiracy, the SIU was structured from the top down with a captain, a lieutenant, and five or six sergeants. Each sergeant was in charge of 10-15 police officers who were divided into different field teams, generally with 4-5 men to a team (153-154). The field teams operated with almost complete autonomy. The team leader, the individual with the most experience in drug investigations—usually the senior officer, was allotted nearly absolute discretion in initiating and conducting narcotics investigations. As a rule, the desk supervisors, who did not go into the field except for major arrests (649-650), accepted the field judgments of the team leader (653, 671).

The appellants, then First Grade Detectives John McClean and Ramon Viera and Second Grade Detective Edward Codelia, were the core of an SIU field team from 1969 until late in the year 1971 (265). The team leader was Detective McClean (158); the number two man was Detective Viera. During 1971, the McClean team had a fourth member, Luis Martinez, who served mainly as an interpreter (157). That same year the team's supervisory sergeant was a Gabriel Stefania, who had been in the SIU since 1969 (647-648). Both Martinez and Stefania were named in the indictment as co-conspirators but not as defendants. The field commanding officer was Lieutenant John Egan, also an unindicted co-conspirator (647). The headquarters commanding officer from 1968 until November 1969 was a Captain Daniel Tange (1371). After Tange's departure, his post was filled by a Captain Daniel O'Brien (647-648).

It is with Captain Tange that the threads of the conspiracy are best picked up.

C. Tange Joins The Conspiracy

In February 1968 Captain Daniel Tange, a young man on the rise in the New York City Police Department, was assigned as the Commanding Officer of the Headquarters District and given responsibilities for administration of the SIU (1369-70). After a year with the SIU, Tange, who had never been involved in police corruption, was aware of the illegal money being made by the men he commanded. One day in the summer of 1969, Tange had a drink with John McClean, one of the appellants, at a bar near the Queens District Attorney's Office. He told McClean that he wanted to be in on any illegal money taken in by the SIU in the course of official duties, as long as it did not include money made from selling drugs (1384). McClean agreed to this, saying that Tange could come in as an "equal partner". McClean went on to describe the careful way in which he and his team made "scores"—only looking for an occasional score where everything could be covered up. Sometime during this conversation, McClean slipped a white envelope containing $1000 into Tange's pocket (1374-75). Before leaving the bar, the two men discussed a Sergeant Horigan who had originally approached McClean on Tange's behalf.[1] McClean instructed Tange that, in the future, his superior, Horigan, would not be needed as a go-between; the two police officers would deal directly with each other. (1375-76).

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[1] Captain Tange had spoken with Sergeant Horigan two weeks previously, and expressed his desire to be in on the illegal take. Horigan, happy that one of his superiors had seen the light and had finally "changed [his] mind," agreed to put out feelers to the Sergeants and other people in the units. Later. Horigan got back to Tange to say that he had spoken with some members of the units—one of whom was apparently the Chief of the Narcotics Bureau, Tange's superior—and that there would be no problem. After this conversation, as a sort of welcoming, Tange was given $500 by Detective Leuci with the promise that more would be coming later (1376-1381).

Sometime after his meeting with McClean, Tange met with the appellant Codelia and Detectives Falk and Weiss, (members of other SIU "teams") and Sergeant Horigan at a restaurant near the Narcotics Bureau (1385). The police officers discussed Tange's desire to be included as a partner in the illegal money. Horigan and Weiss assured Tange that the team would go along with his participation. Outside the restaurant Detective Weiss handed Tange an envelope containing $1000 (1387). It was only the beginning.

Shortly after this meeting, Tange shared in the proceeds from an arrest, receiving $1,300 from another team of detectives. In late 1969 Tange was given a leave of absence from the SIU to attend the F.B.I. National Academy in Washington, D.C., a sign that he was regarded by his superior as a man with a bright future (1388-89). Even so, Detectives Falk and Codelia managed to personally deliver Tange's share of the illegal take to him while he was in Washington (1338). After Tange returned to New York City, Falk and Codelia delivered more illegal money (1389). On one occasion, Tange received $500 from a Detective Nunziata, who later became a member of the McClean team (1390).[2] All told, Tange received $10,000-$12,000 from various police officers in the SIU (1389-90).[3]

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[2] Detective Nunziata participated in the illegal shakedowns with the McClean team. On October 27, 1969, Joseph Calvo, a drug dealer, and Betty Calvo (then not yet married) were arrested by Detectives McClean, Viera and Nunziata. At the Calvo apartment, according to the testimony of Betty Calvo, the officers "tor[e] up my house, dumped everything out of the drawers, and searched everything, and they had shopping bags with a lot of personal papers and some money sitting on the floor". In addition, $20,000 in cash was removed by the police officers. Joseph Calvo was told that, if he signed a receipt for $320, he would be given back his jewelry and car keys. Calvo complied—the $20,000 taken from the apartment by the detectives was never returned (1334-1338).

[3] Tange, who testified at the trial, is cooperating with State and Federal prosecutors in a number of investigations (1391-1392).

D. The Olate Shakedown: November 1970

One of the most lucrative scores made by the McClean team was the fruit of several weeks of surveillance work and illegal wiretapping conducted by Detectives McClean, Viera, Codelia and Nunziata at an apartment building located at 6515 38th Avenue in Queens. The illegal wiretaps were installed with the cooperation of the apartment house manager and the managing agent who believed that they were assisting the SIU team in a drug investigation focusing on the occupant of apartment 6-Z (903, 1166). Both apartment employees later made in-court identifications of the appellants (900-901, 1166).

Operating out of the first floor meter room (904), the appellants installed a tape recorder and hooked it into a telephone box on the basement wall through which ran all the telephone lines in the building (904-908). During a three to four week period in late October and early November, 1970 the appellants and Detective Nunziata were observed in the meter room on several occasions by both the apartment house manager and the managing agent (909-910, 1169-1171). On one occasion, Detective Codelia showed the apartment house manager, Paul Stern, the tape recorder—it was of the automatic start-stop variety, activated when the tapped telephone was lifted off the receiver—and played a tape of one conversation which was entirely in Spanish (911-912). The wiretapping was conducted without court authorization or notice to any law enforcement agencies or the New York Telephone Company (1468-1470, 1506-1508; Gov. Ex. 111). In fact, legal wiretaps were always installed by the Central Intelligence Bureau, never by the SIU (263-264).

One morning, Stern reluctantly accompanied McClean to apartment 6-Z. McClean searched the apartment and found two pieces of luggage, each containing approximately $500. Stern assisted in the search, uncovering a

gun in a closet (913-914). At this point, Stern decided that he had sufficiently discharged his obligations as a citizen and left the apartment. McClean had not in any way indicated that he had a search warrant for the apartment (914).

Although apartment 6-Z was leased to a Luis Martinez, a former employee in the Mexican embassy (1284), and currently sublet to a Jorge Santander, the McClean team's quarry turned out to be one Nicodemus Olate Romero, a Chilean narcotics dealer who occupied the apartment from November 17-19. It was a small irony that Olate had borrowed the use of the apartment from his friend Santander to avoid surveillance by another SIU team that had arrested him in Manhattan in September and ripped nearly $8000 from his pockets, money which Olate never saw again (952-53). On November 17, Olate, his wife and an associate Justo Quintanilla (also shaken down in the September arrest) moved into the apartment. Money transactions were apparently the mainstay of activity among the occupants of apartment 6-Z and their friends. On his first evening in the apartment, Olate asked Martinez, whom he had met through Santander, to change $5000 in small bills into $100 bills for easier transportation back to Chile; the next day Olate and his wife made similar exchanges of more money and then deposited the cash in a bank where Olate's wife had recently rented a safety deposit box (963).

Unfortunately for Olate, his money transactions were apparently mentioned on the telephone and overheard by the McClean team. On the 19th of November, with Olate's departure to South America possibly imminent, the team apparently decided to make its move. Around 5 or 6 p.m. that evening Olate's wife and Quintanilla left to do some shopping. Ten minutes later, the doorbell rang twice--the arranged signal for the door to be opened by an occupant. Olate went to the door and found Detectives

McClean, Codelia and Wolff on the other side, guns drawn.[4] The three police officers placed the barrels of their guns against Olate's head and moved him back into the apartment (967-69). A few moments later, Detective Viera and Lieutenant Egan arrived with Mrs. Olate and Justo Quintanilla in handcuffs (969-970).

All of the police officers, except Lieutenant Egan, began a search of the apartment. The one room apartment was literally ransacked. Coats were slashed with a razor (1301), furniture was overturned, and books were thrown open (1301). Finally, after the place had been reduced to a shambles, the McClean team found itself in possession of a gun, a bag containing cocaine, and two keys to the safe deposit box. In addition, $17,500 in fifty and one-hundred dollars bills were taken from a night table and several thousand dollars in cash was taken from the persons of Olate, his wife, and Quintanilla. When Olate argued that the gun and the cocaine were not his, that the police had planted them, Detective Codelia (who was doing the translating) began screaming at him (973-974). At one point, Olate offered to "talk" but was rebuffed (974).

The detectives then wanted to know how much money Olate had in the bank. When Olate claimed that he had $30,000-$40,000, Codelia told him, "You are lying because you have more money. You have 30, 40, 50, 60, 70, 80, 90 thousand dollars" (975). Believing that the money in the apartment was already lost—he never saw it again after that night—Olate asked, "How much money do you want me to turn over to you for my freedom?" (976-978). After a conference with the rest of the detectives, Codelia stated that the price would be $60,000 (977). Apparently, to account for the time that had been spent on the investigation, it was determined that one "arrest" would

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[4]Detective Wolff was named a co-conspirator but not as defendant.

be made, and Justo Quintanilla volunteered to be temporarily arrested. It was arranged by Codelia that Quintanilla would be arrested under the name Jorge Santander for possession of the cocaine supposedly found in the apartment (978) and that he would be bailed at $2,000 (978-979). Before he was taken to the police precinct by Codelia, Egan and Viera, Quintanilla was instructed as to his false identity and given documents of Santander to use in court (979).

Detectives McClean and Wolff kept Olate and his wife in the apartment during the night. Early the next morning, after Codelia and Vi[illegible]a returned, Olate was instructed to telephone Luis Martinez and request that the immigration papers and $5000 in cash, that Martinez was using to obtain an extension of Olate's visa, be returned (982-983). Obviously, the detectives knew of Martinez and his transactions with Olate through their wiretaps. After talking with Martinez, Olate and his wife were driven to Manhattan by the appellants and Detective Wolff (1299-1300). They stopped at the office building where Martinez worked and Olate left the car to pick up the money and immigration documents (986). Martinez testified that Olate seemed upset that morning (1300).

At the bank, Olate's wife withdrew their money from the safe deposit box (Gov. Ex. 74; Tr. 997). After a futile attempt to withhold part of the money (987-989), she turned $68,000 over to the McClean team. Codelia, in an unusual spurt of generosity ("we have taken all of the money from all of the Chileans that we have found"), left $8000 with Olate (989). McClean, after instructing Olate that he had to leave New York immediately, wished him a Merry Christmas with his children in Chile and, to end the business on a congenial note, slapped Olate's hand ("slapped five") (990). Later, McClean helped Olate arrange for a bail bondsman to obtain Quintanilla's release (991). On two more occa-

sions that day, the detectives told Olate to leave the country (993). The following day, November 21, 1970, Olate and Quintanilla departed the United States for South America (Gov. Ex. 62; 993, 998). Olate did not return to the United States until he was expelled by the Chilean Government on December 4, 1973 (993-994).[5]

E. The Solomon Arrest: October 1971

During October of 1971, Detectives McClean, Viera and Codelia and a new addition to the team, Patrolman Luis Martinez, were investigating a suspected narcotics dealer, the late Ernest Solomon[6] (Gov. Ex. 82; 163). The team supervisor at SIU Headquarters during this period was Sergeant Gabriel Stefania (656-657).

On October 27, 1971 at 1:00-2:00 A.M. (184), Solomon was arrested in a bar on Albany Avenue in Brooklyn as a result of information obtained from electronic and visual surveillance (657-659). He was eventually taken to his apartment at 91 Ocean Parkway where, pursuant to a warrant obtained by Detective Viera (Government Exhibit 55; Tr. 167), a search was conducted by the McClean team. An automatic pistol and a leather bag containing a large sum of money were uncovered

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[5] At that time, Olate was under indictment in the Eastern District of New York for narcotics violations. He began cooperating with the government in March 1974 and testified at numerous trials and before grand juries. The State charges, stemming from the September 1970 arrest were dismissed (997); Olate was given an eight year sentence after pleading guilty to a federal narcotics violation (950).

[6] Stefania, an unindicted co-conspirator who testified at the trial, pled guilty to a charge of filing a fraudulent income tax return, receiving a six months sentence and three years probation in exchange for cooperating with the government (645). Martinez, also an unindicted co-conspirator who testified at the trial, received a six months jail term and three years probation after pleading guilty to income tax evasion in the Southern District of New York (150-151).

by McClean and Viera (170, 660-61). Solomon began talking with the police officers, asking that he be allowed to keep the money. Stefania told him, "no, we are going to seize it", but after a discussion among the police officers it was decided that Solomon would be given $700 to $1000, a portion would be vouchered with the Property Clerk at Police Headquarters, and the rest would be divided among the members of the McClean team (171-173, 661-662). Stefania later testified that the appropriated money was not considered to be a bribe by Solomon, the detectives had simply appropriated the money for themselves (667).

Solomon was then taken to a police precinct and booked. The members of the McClean team met (by this time it was morning) at the Brooklyn District Attorney's Office. There, Stefania was given his share of the proceeds by McClean (approximately $500 contained in a black leather valise) (184-185, 667). A total of $4,125 was vouchered with the Property Clerk's Office (Gov. Ex. 57, 83; 185). Solomon signed a receipt for the vouchered money although not required to do so (186-188).[7] This procedure was standard for the McClean team since it prevented the extorted narcotics dealers from claiming that a larger amount of money had been seized than had actually been vouchered (188-678). It was, as McClean had described it to Tange, a careful operation where everything could be covered up (1384).

F. Grimke-Mirabile: November 1971

In November the McClean team, composed of the same police officers who had worked the Solomon case so successfully, was conducting an investigation of a John Grimke and a Vito Mirabile, suspected narcotics dealers

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[7] Solomon was murdered on the first day of the trial. He had been scheduled to testify as a witness for the United States (37).

(Gov. Ex. 84; 191). After discussing their suspects' transactions in "very hard" drugs, the team decided to install a wiretap at the Grimke residence. No affidavit, court order or warrant was obtained for the Grimke wiretap (Gov. Ex. 47; 207-208). The wiretap, utilizing the same automatic starter-shutoff system (activated when the telephone is picked up) used in the Olate investigation, was installed by Codelia and Martinez (195). Daily, for 7-10 days, the members of the McClean team would check the wiretap, listen to the conversations recorded and, afterwards, tried to determine the meaning of the conversations, often spoken in code (202-204).

Finally, satisfied that they were dealing with high level narcotics dealers, the McClean team obtained a search warrant for the Grimke and Mirabile residences (Gov. Ex. 48; Tr. 209-214). The supporting affidavit for the warrant, prepared by McClean and Martinez, stated falsely that a confidential informant had provided the information for the affidavit (212). No mention was made of the wiretap installed at the Grimke residence.

On November 13, 1971, Grimke was arrested in Queens by Codelia, McClean, Viera, Stefania and Martinez (Gov. Ex. 50; Tr. 214). After a search of the Grimke residence, which uncovered some narcotics mixing paraphernalia (678), the McClean team, Grimke in hand, drove to Mirabile's residence in Massapequa, Long Island (214-215, 678). Mirabile's home was searched and a loaded .38 revolver uncovered. McClean, in charge of the operation, ordered the detectives to break into Mirabile's Cadillac when the keys to the car were not produced by Mirabile (217-218, 680). Inside the trunk of the Cadillac was an attache case containing a few ounces of heroin and a large sum of United States currency (218, 680), of which McClean quickly took custody. Mirabile was placed under arrest (228).

Mirabile disclaimed any knowledge of the drugs, but maintained that the money was from his business. Sergeant Stefania stated that he was "going to seize it". Mirabile pleaded that he had to leave some money for his wife while he was in jail (680-681). McClean, Viera and Stefania decided to give Mirabile approximately $1000 and divide the remaining $19,000, less a portion for vouchering, among the five police officers participating in the arrest (681-682).

The team took the prisoners to the 7th Precinct in Nassau County. There, they were told that their prisoners would have to be arraigned in Queens County, the place where the warrant had been obtained (228-229, 683). Packing everybody back into two cars the SIU team drove to the 112th Precinct in Queens County. At the Queens Precinct they managed to get Grimke and Mirabile booked and to voucher the drugs and $9485 of the seized money (229-234, 683-684) (Gov. Ex. 50-52, 88-90). Mirabile signed a receipt for the vouchered currency (Gov. Ex. 52; Tr. 234-235, 686-687).[8]

After the processing was completed, the McClean team rendezvoused near the Grimke residence (236). Arriving first in one car, McClean, Viera and Stefania waited for the others. When Martinez and Codelia pulled alongside, McClean tossed a loose stack of bills into Codelia's car. As the money scattered over the interior of the car, McClean, laughing, drove away. Eventually, after the bills had been picked up, Martinez found that he had received $1000 for his part of the night's work (236-237, 687-689). Stefania also received approximately $1,000 (682).

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[8] Vito Mirabile was scheduled to testify at the trial. Although served with a subpoena he disappeared and was not located during the course of the trial (1161).

G. The Esparza-Lindquist Wiretap: November-December 1971

This wiretap was nearly the McClean team's undoing. and Martinez (Gov. Ex. 85; Tr. 248-250). On November 18, 1971, the team—the three appellants received information that Armando Esparza was conducting a large-scale narcotics operation in Brooklyn. After a meeting held at the Brooklyn District Attorney's Office, the team decided to place an unauthorized wiretap at the Lindquist residence, 2785 Ocean Parkway (Gov. Ex. 60; Tr. 251-256, 1469, 1506-1508). McClean, Codelia and Martinez went to the vicinity of the Ocean Parkway address in Brooklyn to find a location for the wiretap equipment. The superintendent of 2785 Ocean Parkway, Julio Colimario, who later identified McClean in court as one of the police officers who approached him, was unable to provide a satisfactory location (576-588). The detectives then tried 2815 Ocean Parkway, a nearby apartment building. There, the superintendent, Marcial Borges, who later identified Codelia in court as one of the police officers who asked for assistance in installing a wiretap, was able to offer an empty studio apartment, and the next day the police officers placed tape recorders and other equipment in the apartment (602-608). Codelia and Martinez made daily visits to their installation, Martinez providing translations when the conversations were in Spanish (262, 604-608). When the apartment was rented, the equipment was moved to a storage room and the appellants continued their daily visits.

In late November or early December 1971, the Special Investigations Unit was restructured. Detective Viera [9] and patrolman Martinez were transferred out of the Mc-

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[9] Viera was not named in this count because he was not present at the wiretap site, but the record discloses that he had knowledge of activities of his brother officers in connection with this wiretap.

Clean team. Nonetheless, the appellants managed to meet and discuss the Esparza wiretap (264-266). On December 2nd, a security supervisor for the New York Telephone Company, acting on a call from a telephone repairman, discovered the unauthorized monitoring equipment at 2815 Ocean Parkway and later found out that it was wiretapping a telephone in the Lindquist residence (559-565). On the evening of December 2nd, the telephone security supervisor showed the recording equipment to Assistant District Attorney Hersey and two detectives from the Brooklyn District Attorney's Squad. The equipment was dismantled and taken to the District Attorney's office (631-637).

Understandably worried, Codelia, McClean, Viera and Martinez met with Assistant District Attorney Hersey at the Brooklyn District Attorney's Office. After a meeting with Hersey, to which Martinez was not privy, McClean informed Martinez that "there would be no problem", although Martinez should not expect to get his part of the equipment back (271-272).

H. The Defense

The appellants put in no defense. None of them took the stand, although their arrogant conduct, while seated at the defense table during the case-in-chief, evoked a warning from *the jury* that it was not going unnoticed (1417).

POINT I

The evidence under Counts One through Four was not insufficient as a matter of law.

A. Introduction

Appellants claim that the evidence on Counts One through Four was insufficient because "the statutes under which those counts were ostensibly drawn were not

designed to cover acts, criminal under state law, which incidentally deprived persons of their federal rights". We, of course, do not accept appellants' characterization of the record. What is here involved is the blatant misuse of official power to deprive individuals of the rights guaranteed them by the Constitution; "[t]he fact that it is also a violation of state law does not make it any the less a federal offense, punishable as such." *Screws* v. *United States*, 325 U.S. 91, 108 (1945).

There are, in fact, compelling considerations favoring the application of Section 242 here. First, the very very purpose of Section 242 is to "afford protection against officers who possess authority to act and who exercise their powers in such a way as to deprive a person of rights secured to him by the Constitution or laws of the United States". *Screws* v. *United States*, *supra*, 325 U.S. 112 (1944). Second, the likelihood of state criminal prosecution is often nil. "Complaining to the police that they have acted illegally is not likely to result in a criminal prosecution. A police captain or a district attorney will not take criminal action against a subordinate. Prosecutors do not prosecute the police. Even if a prosecutor is not himself involved in the criminal behavior of the police, he cannot sacrifice his job by damaging the intimate relationship he must maintain with other law enforcement agencies." Levy, *Against The Law: The Nixon Court and Criminal Justice*, pp. 64-65 (Harper and Row, 1975). Moreover, even if a local prosecutor is willing to undertake prosecution of official lawlessness, the victim of such misconduct, "a citizen of unsavory reputation or record" (*Id.* at p. 65), is hardly likely to have sufficient confidence in him to file a complaint, for there is no guarantee that he, instead of the police officer, will wind up being prosecuted. The federal interest in these circumstances is apparent.

We need not, however, belabor this issue before getting down to the specific of appellants argument, for it is now settled that if there is present an intent to deprive persons of money or other property without the process that is due, then it matters not whether this was the principal purpose of the conspiracy or merely a secondary purpose. *Anderson* v. *United States*, 417 U.S. 211, 227 (1974); *United States* v. *Fayer*, No. 75-1147 (C.A. 2, September 24, 1975), Slip op. pp. 6193-6194. With this as an introduction we proceed to deal in more detail with the collection of specious arguments which appellants have marshalled.

B. Sufficiency Under the Conspiracy Count

Appellants begin their discussion of Count One with the gratuitous observation that their analysis "is made more complex than it ought to be by the strange history of that Count" (Br. 24). In fact their problems are less severe because of that history. Unfortunately, Section 241, which makes it an offense punishable by up to ten years in prison and a $10,000 fine, to *conspire* to violate rights secured by the Constitution or laws of the United States, protects only "citizens" against such lawless conduct; on the other hand, Section 242, which makes it a (substantive) offense, punishable by a year in jail and a $1,000 fine, to violate, under color of law, rights secured by the Constitution or laws of the United States, protects not merely "citizens" but "inhabitants" of any State.[10]

Because some of the victims of appellants' misconduct were aliens, and not "citizens", the single conspiracy count charged a conspiracy (under Section 241) to violate the rights of "citizens" and a conspiracy (under Section 371) to violate Section 242 by conspiracing to

[10] Both statutes provide for a life sentence if death results to the victim.

subject "inhabitants of the State of New York" to the deprivation of rights secured by the Constitution and laws of the United States. Judge Weinstein, although agreeing that a single conspiracy count was proper (1610), decided that it would unnecessarily complicate matters for the jury to submit it to them as charged. Accordingly, at appellants urging (1584), he deleted the Section 241 conspiracy (the felony) and submitted Count One as a conspiracy, under Section 371 to violate Section 242 (a misdemeanor). The benefit to appellants from this action is apparent.

Not content to deal with the issue whether the evidence was sufficient to sustain a conspiracy to violate Section 242, of which they were convicted, appellants continue their argument by suggesting that the evidence *would* have been insufficient to sustain a conviction under Section 241 *if* that had been submitted to the jury. This is so because, they allege, "Section 241 was not intended to penalize a conspiracy to deprive a citizen of rights the protection of which was left to the states, such as rights under the due process clause—e.g., the right not to be deprived of property without due process of law" (Br. 26). This claim is accompanied by "a few examples" to prove the point. "If Section 241 penalizes any conspiracy to perform acts the result of which would be to harm a citizen's right not to be deprived of property without due process of law" then, appellants claim, "it would apply to every group of teenagers who decided to mug a citizen walking along a street, every pair of miscreants who decide to rob a liquor store and every prospective purse-snatcher who had the federal misfortune to deal with an accomplice" (Br. 26).

Appellants are obviously unaware that a citizen can only be deprived of due process of law by the State or persons acting on its behalf. "The Fourteenth Amendment protects the individual against *state action* not against wrongs done by individuals". *United States* v.

Williams, 341 U.S. 70, 92 (1951), dissenting op. of Douglas, J; *United States* v. *Guest*, 393 U.S. 745, 755 (1965). Accordingly, while a citizen who is mugged on the street by a group of teenagers may have been deprived of property illegally he has not been denied any right protected by the Due Process Clause. Here, of course, the conspirators were not a group of teenagers, but New York City law enforcement officers taking property under color of official right without according the process due in such circumstances. There is no doubt that Section 241 covers such a conspiracy. *United States* v. *Price*, 383 U.S. 787, 801-806 (1965); *United States* v. *Guest*, 383 U.S. 747 (1965).

With these irrelevant and frivolous claims aside, we deal now with the collection of specious arguments advanced with respect to both the conspiracy to violate Section 242 and the three substantive violations of Section 242. Since the same arguments are directed to both the conspiracy and the substantive offense, we deal with them below.

C. Sufficiency Under the Substantive Counts

1. Appellants begin by arguing that "in no way does a common sense reading of the record justify anything other than a conclusion that appellants' intent was to make money by virtue of the opportunities afforded them by their position as police officers who come into contact with major drug peddlers". Their conduct they claim "was not shown to have been motivated by a specific intent to deprive persons of their federal rights" (Br. 31).

This argument simply confuses motive with intent. Appellants' motive obviously was "to make money by virtue of the opportunities afforded them by their position as police officers"; but they could have accomplished their objective only by taking money from the individuals under color of law, without according them the process that was

due under the Constitution. And there was abundant evidence that they intended to do so. Particularly apposite here is *Anderson* v. *United States*, 417 U.S. 211, 227 (1974), which involved a conspiracy under Section 241, to cast fictitious votes for federal, state, and local officers. The appellants argued that their sole purpose was to influence elections for local officers, and although fictitious votes were cast for federal office, they did so not to influence the federal election but merely assure that their conduct with respect to local offices would go undetected. In rejecting this claim, Mr. Justice Marshall observed that: "The specific intent required under Section 241 is not the intent to change the outcome of a federal election, but rather the intent to have false votes cast and thereby to injure the right of all voters in a federal election to express their choice of a candidate. * * * And, whatever their motive, those who conspire to cast false votes in an election for federal office conspire to injure that right within the meaning of Section 241" (417 U.S. 228).

Similarly, here, whatever appellants' motive, their conspiracy was to take property from persons whom they arrested and detained in their official capacity without affording these individuals the basic procedural safeguards due before an individual may be deprived of his life, liberty or property. The fact that appellants "may not have been thinking in Constitutional terms is not material where their aim was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution. When they so act they at least act in reckless disregard of Constitutional prohibitions or guarantees", *Screws* v. *United States*, 325 U.S. 91, 106 (1944). Accord: *United States* v. *O'Dell*, 462 F.2d 224, 232 n. 10 (6th Cir. 1972); *United States* v. *Delerme*, 457 F.2d 156, 161 (3d Cir. 1972); *United States* v. *Ragsdale*, 438 F.2d 21, 26 (5th Cir.), *cert. denied*, 403 U.S. 919 (1971). See also, *United States* v. *Stokes*, 506 F.2d 771, 776-77 (5th Cir. 1975); *United States* v. *Ramey*, 336 F.2d 512 (4th

Cir. 1964), *cert. denied*, 379 U.S. 972 (1965); *United States* v. *Ehrlichman*, 376 F. Supp. 29, 35 (D.C. D.C. 1974).

Appellants' reliance upon *United States* v. *Guest*, 383 U.S. 745, 760 (1966), is misplaced. There at stake was "the right of free interstate passage"—a right which may be abridged by private individuals not acting under color of law (383 U.S. at 759, n.17). In such a case, it may be necessary to establish that "the predominant purpose of the conspiracy", *United States* v. *Guest*, 383 U.S. 745, 760 (1966), is to impede or prevent the exercise of the right of interstate travel; otherwise "every conspiracy to rob an interstate traveller" would constitute a violation of Section 241 (*Id.* at 760). That would clearly be contray to the intent of Congress.

Here there was sufficient evidence for the jury to have found that appellants' predominant purpose was to deprive the victims of their property without due process.[11] But the language quoted from *United States* v. *Guest*, *supra*, at pp. 30-31 of appellants' brief, is inapposite here for a more basic reason. The very purpose of Section 242, which unlike Section 241 deals solely with acts under color of law, is "to afford protection against officers who possess authority to act and who exercise their powers in such a way as to deprive a person of rights secured to him by the Constitution or laws of the United States. *Screws* v. *United States*, *supra*, 325 U.S. at 112. Accordingly, in a prosecution under Section 242 where it is shown that the action undertaken by the officers "was not to enforce local law but to deprive a citizen of a right and that right was protected by the Constitution", then their conduct is plainly punishable under Section 242, even though their only motive was to "make money". That showing was

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[11] Appellants' purpose, of course, need not have been expressed verbally in order for the jury to find them guilty. It may "be reasonably inferred from all the circumstances attendant on the act." *Screws* v. *United States*, *supra*, 325 U.S. at 106.

28-30) unlike *United States* v. *Screws*, *supra*, the jury was properly instructed. With such instructions, the verdict was plainly supported by the evidence detailed in the statement of facts.

2. Appellants also argue that the "status of the money taken also shows * * * that no violation of the Civil Rights Act occurred here" (Br. 29). They claim that, since the money which they took and kept for their own use "was clearly the proceeds of the sales of narcotic drugs", it was the equivalent of "contraband", which is subject to forfeiture, and not the "property" of those who may possess it. "If the money taken truly was the 'property' of anyone, it was New York State, to which the sums were forfeit" and "appellants did not violate the drug dealers' Fourteenth Amendment rights by seizing that contraband for their own use" (Br. 30).[12]

To begin with, this argument lacks support in the facts of the case. The appellants literally grabbed all the money they could find, whether it was in the trunk of a car, a woman's handbag or a safety deposit box. No evidence was introduced to establish that all of the indiscriminately seized money was contraband, to which the victims could not assert a claim. More significantly, this argument ignores the thrust of the protection of the Due Process Clause; the protection afforded by the Due Process Clause is not an absolute guarantee that property will not be taken, rather, it insures that, if it is taken, it will be in accordance with the procedural protections which have come to be regarded as due. If the monies appropriated here were the product of illegal narcotics trafficking, and New York State sought to have it forfeited, then it would be required to establish its case

[12] Presumably, under appellants' view, law enforcement officers who arrest an individual for a capital offense could execute him summarily, since the State could lawfully take the defendant's life if he is convicted.

in an appropriate judicial or quasi-judicial proceeding. See *McClendon* v. *Rosetti*, 460 F.2d 111 (2d Cir. 1972). Nothing is more well settled than the principle that a person may not be permanently deprived of his property on the unilateral determination of a law enforcement officer that it is forfeitable.[13]

Similarly, it is irrelevant that the money taken by the appellants may have been "seizable as evidence of the drug offenses". The appellants did not seize it for that purpose; they permanently appropriated it for their own use without affording the individuals from whom it was taken the process that is due. They were tried fairly and convicted justly for that offense.

3. Contrary to appellants' claim (Br. p. 28, n. 34) the application 18 U.S.C. 242 here in no way constitutes a novel application of the statute as the appellants maintain. In a variety of contexts, 18 U.S.C. 242 has been used to obtain convictions of state officials who willfully interfered with the property rights of inhabitants without regard to due process of law. In *United States* v. *Senak*, 477 F.2d 304 (7th Cir.), *cert. denied*, 414 U.S. 856 (1973), the defendant, a public defender in Indiana, had been charged with exacting fees from indigent clients by threatening inadequate legal representation unless extra sums were paid him. The indictment, held to be

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[13] Appellants' claim, that the victim of the conduct alleged in Count II (Nicodemos Olate Romero), was actually guilty of bribery, is absurd. The victim was taken into custody at gunpoint, his apartment was ransacked by appellants who carted off the money they could find (see, *supra*, pp. 7-12). Afterward, another $65,000 was extorted from Romero in return for "allowing" him to go back to Chile. The jury was certainly entitled to infer, under all of the circumstances described at, *supra*, pp. 7-12, that even this additional money was taken in violation of the Due Process Clause.

sufficient, specifically charged that the defendant's acts had deprived his clients of their right to property without due process of law. Similarly, in *Culp* v. *United States*, 131 F.2d 93, 98 (8th Cir. 1942), the defendants, Arkansas law enforcement officers, were convicted under the predecessor statute of 18 U.S.C. 242 for falsely arresting inhabitants of various states and then forcing the arrestees to pay for their freedom. In affirming their convictions the Court of Appeals stated that:

> "[T]he immunity of an inhabitant of the United States from a deprivation of life, liberty, or property by state action not amounting to due process of law is an immunity secured and protected by the due process clause of the Fourteenth Amendment. See opinion of Mr. Justice Stone in Hague v. C. I. O., 307 U.S. 496, 524-527, 59 S.Ct. 954, 83 L.Ed. 1423.
>
> It is our opinion that a state law enforcement officer who, under color of state law, willfully and without cause, arrests and imprisons an inhabitant of the United States for the purpose of extortion, deprives him of a right, privilege, and immunity secured and protected by the Constitution of the United States, and commits one of the offenses defined in § 52, 18 U.S.C.A."

Accord: *Brown* v. *United States*, 204 F.2d 247 (6th Cir. 1953). *See United States* v. *Konovsky*, 202 F.2d 721 (7th Cir., 1953); *United States* v. *Barr*, 295 F. Supp. 889, 891 (S.D.N.Y. 1969) ("sewer" service resulting in entry of default judgment held to violate 18 U.S.C. 242 as an interference with or deprivation of property without due process of law). *Cf. United States* v. *Wiseman*, 445 F.2d 792 (2d Cir. 1971), *cert. denied*, 404 U.S. 967.

POINT II

Counts Two through Four state an offense and the instructions to the jury were correct.

1. The three counts charging a substantive violation are identically worded, except as to the name of the victim, and read as does Count Two, as follows (A. 12):

> On or about and between November 19, 1970 and November 20, 1970, both dates being approximate and inclusive, within the Eastern District of New York, JOHN McCLEAN, RAMON VIERA and EDWARD CODELIA, the defendants, acting under color of law, wilfully, knowingly and unlawfully, did take, abstract and appropriate to themselves approximately $81,600 from Nicodemus Olate Romero, Justo Quintanilla and Elba Guzman, thereby depriving said individuals of a right secured and protected by the Fifth and Fourteenth Amendments to the Constitution of the United States, namely, the right not to be deprived of property without due process of law. (Title 18, United States Code, § 242 and § 2).

Appellants claim that Counts Two through Four are insufficient because "each failed to allege an essential element of the crime charged—that the purpose of the conduct was to deprive the individuals involved of their federally protected rights" (Br. 33). But, just as it is unnecessary in order to establish the specific intent necessary to sustain a conviction that "the defendants were thinking in Constitutional terms" (see, *supra*, p. 22), an indictment or information, charging an offense under Section 242 need not speak in "constitutional terms".

Here the indictment alleged that acting under color of law—a term which is shorthand for "[m]isuse of power,

possessed by virtue of state law and made possible only because the wrongdoer is clothed with authority of state law"[14]—appellants, knowingly and unlawfully took and appropriated to themselves a specified sum of money from a named individual thereby depriving the victim of the constitutional right not to be deprived of property without due process of law. The indictment, thus charged, in effect, that appellants' "aim was not to enforce local law but to deprive a citizen of a right [property] and that right was protected by the Constitution" *United States* v. *Screws*, *supra*, 325 U.S. at 106. It is plainly sufficient. See *United States* v. *Price*, 383 U.S. 787, 793 (1966), which sustained a similarly worded indictment.[15]

Moreover, even if Counts Two through Four are not sufficient, any error is harmless if in fact the charge which was submitted to the jury was correct. The rule against amending an indictment to conform to the proof, is based on the right to be tried on an indictment returned by a grand jury (*Ex Parte Bain*, 121 U.S. 1, 10 (1881)). Where a defendant is not entitled to be indicted by a grand jury, obviously an amendment of an indictment does not deprive him of "a substantial right" (F. R. Crim. P., Rule 52), and if error at all is harmless. Indeed, since the "indictment" is signed by the United States Attorney and the foreman of the grand jury, it is both an "information" and "indictment". (*United States* v. *Macklin*, 389 F. Supp. 272 (E.D.N.Y. 1975), affirmed — F.2d —, No. 75-1189 (2d Cir., Sept. 4, 1975); and an

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[14] *United States* v. *Classic*, 313 U.S. 229, 226 (1941).

[15] There, each count of the indictment charged that (383 U.S. at 793): "[T]he defendants, acting 'under color of the laws of the State of Mississippi,' 'did wilfully assault, shoot and kill' Schwerner, Chaney and Goodman, respectively, 'for the purpose and with the intent' of punishing each of the three and that the defendants 'did thereby wilfully deprive' each 'of rights, privileges and immunities secured and protected by the Constitution and the laws of the United States'—namely, due process of law."

information may be amended by the United States Attorney or the district court. F. R. Crim. P., Rule 7(e); cf. *United States* v. *Blanchard*, 495 F.2d 1329 (1st Cir. 1974).

Here, each of the three counts at issue where misdemeanors and the defendants enjoyed no constitutional right to indictment by grand jury. Accordingly, barring a showing of prejudice, any defect in the indictment was harmless if we are correct in our submission that the charge to the jury was correct.[16] We proceed presently to a discussion of this issue.

2. Appellants argue that "the trial court's charge explaining [Counts Two through Four] allowed the jury to convict appellants in the absence of the required proof that their specific intent was to deprive persons of their federally-protected rights". This claim is without substance. Here again appellants not only ignore the holding

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[16] We recognize that in *United States* v. *Goldstein*, 502 F.2d 526 (2d Cir., 1974), the Court of Appeals for the Third Circuit (en banc), by a 5-4 vote, held that an indictment charging a misdemeanor could not be amended and that such an amendment is *per se* prejudicial. The majority opinion is not binding here, and we believe that the dissenting opinion is for more persuasive. The majority opinion took the position that since the United States derives on advantage by proceeding with an indictment, i.e., right to use the grand jury to investigate crimes, it was somehow unfair to deprive the defendant of rights which attach to an indictment by a grand jury (502 F.2d 531). The use of the grand jury to investigate a crime does not, however, preclude the United States Attorney from filing an information at the conclusion of the investigation. Moreover, assuming that a jury may be more influenced in a very subtle way by the fact that a defendant has been charged by a grand jury rather than the United States Attorney (502 F.2d 531), such "subtle" prejudice is eliminated by the usual cautionary instruction; it hardly requires awarding the defendant a right (regarding the amendment of the indictment) to which he is not constitutionally entitled.

in *Screws* v. *United States*, *supra*, and numerous cases construing Section 242 which we have cited earlier (*supra*, pp. 21-22), but the full text of Judge Weinstein's instruction. Judge Weinstein began his charge on this issue by instructing the jury that the United States was first required to prove that in taking the monies at issue the defendants were acting under color of law, that is "misusing the power, possessed by state law and made possible only because the wrongdoer is clothed with the authority of state law" (A. 211). This charge was clearly in accord with *United States* v. *Classic*, *supra*, 313 U.S. at 326. And the jury's verdict that appellants were guilty of misusing their power is plainly supported by the record.

Judge Weinstein then instructed the jury, in the language of *United States* v. *Screws*, *supra*, that in determining whether the appellants acted with the requisite specific intent, it "is not necessary to show or prove that the defendant was thinking in constitutional terms at the time of the incident (A. 212)". Judge Weinstein continued (A. 213):

> If you find that the defendant knew what he was doing and that he intended to do what he was doing, and if you further find that what he did constituted a deprivation of a constitutional right, then you may conclude that the defendant acted with the specific intent to deprive the victims of that constitutional right.
>
> For example, a defendant need not have been aware that a Federal statute or the Federal Constitution was being violated if he was aware that he was wrongfully using his police authority to take property or liberty in violation of the right of a person to be brought to court to have these rights adjudicated in a lawfully way using due process. If a policeman is supposed to arrest and voucher monies found in a prospective defendant's

> possession and he uses his authority to seize that money for his own use, that would be a deprivation of constitutional rights. A mere failure to comply with police or Court regulations because of some mistake or negligence would not suffice.

The appellants, in excepting to this charge below did not claim that the jury should have been instructed that it had to find that appellants "specifically intended to take away a Constitutional right" (A. 230-231); what they asserted was that the jury must find that "the[ir] motivating purpose is not to get money, but deprive the person of the right to—of the property" (A. 231). But as we have shown, the "motivating purpose" is irrelevant, as long as appellants intended, under color of law, to deprive their victims of property without the process due. The charge, more than adequately, instructed the jury as to the legal standards to be applied.

As we conclude our discussion of the numerous arguments advanced with respect to Section 242, all of which we believe to be wholly without substance, we recall Mr. Justice Douglas' concluding paragraph in *United States* v. *Williams*, 341 U.S. 7 (1951). There he observed (341 U.S. 104):

> There cannot be the slightest doubt from the reading of the indictment and charge as a whole that the defendants were charged with and tried for one of the most brutal deprivations of constitutional rights that can be imagined. It therefore strains at technicalities to say that any issue of vagueness of Section [242] as construed and applied is present in the case. Our concern is to see that substantial justice is done, not to search the record for possible errors which will defeat the great purpose of Congress in enacting Section [242].

These thoughts are equally apposite here.

POINT III

The evidence under Count One showed a single conspiracy and the defendants suffered no prejudice even if the evidence showed multiple conspiracies.

1. The conspiracy count (as submitted to the jury) charged the three appellants, together with other police officers, who were named as unindicted co-conspirators, with conspiring to violate the civil rights of "inhabitants" from June, 1969 until the filing of the indictment.[17] In paragraphs one through four, count one details specific activities the defendants performed in furtherance of this conspiracy—such as unlawfully appropriating money from specific individuals. The evidence established a general agreement to appropriate for themselves either all or part of the money seized during the course of arrests of drug dealers. Although the amounts to be vouchered with the property clerk (and the amounts to be appropriated) may have been determined after particular discussions between the officers, the modus operandi in appropriating money was a time-honored process (188, 687).

Appellants make no claim that "the evidence with respect to each individual seizure of money from a drug dealer did not show an agreement among appellants and others to make those seizures" (Br. 41). They argue, however, that the evidence is insufficient to support an

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[17] The proof at trial disclosed that the last overt act was committed in December, 1971, although the "concealing of the existence of the conspiracy" and taking over "steps designed to prevent the disclosure of their activities", as described in paragraph 5, continued up to and including the date of the indictment.

"overall continuing conspiracy". The only agreement that was shown, they claim, was an agreement to consider agreeing in the future that where an opportunity to make an illegal seizure of money arose, the members of the conspiracy would then decide whether to seize money—"a decision which depended on the particular circumstances of the case". In short, they claim that "the team members had obviously expressed among themselves a *willingness to agree in the future* to do wrong where the particular facts of the case suggested that they might safely do so". That, they submit "is a far cry from a punishable conspiracy" (Br. 43).

This argument is frivolous even if one accepts (and we do not) appellants' view of the record. It is conceded that the appellants agreed that they would, under color of law, seize money from persons whom they arrested and they in fact did so. The mere fact that they agreed that they would seize the monies in any particular case only if they could "safely do so", does not immunize that agreement from punishment.

The rationale behind the creation of the offense of conspiracy, as Chief Judge Kaufman has observed, is that an "agreement among numbers of persons to commit an offense [is] itself a danger to society demanding classification as a crime". *United States* v. *Bonanno*, 180 F. Supp. 71, 78 (S.D.N.Y. 1960). Obviously that agreement is no less a danger to society merely because the conspirators agree that they will act to carry it out only if they can "safely do so", particularly where it is plain from the outset, based on past experience, that in fact any number of instances will arise for the safe consummation of their illegal agreement. This is more than an "evil inclination" to commit a crime (Br. 12), it is an agreement to do so, and when followed by an overt act is a violation of Section 371. Indeed, one can think of few dangers to society greater than that

posed by a group of law enforcement officials planning to deprive citizens of their civil rights, where they could safely do so, and further undertaking overt acts to facilitate their illegal agreement.

Moreover, the evidence plainly shows that appellants were guilty of something more than having an "evil inclination"; it is here, of course, that we part company with the appellants' reading of the record. Appellants "start, in analyzing the facts" (Br. 42), and end their analysis as well, with the Tange-McClean restaurant meeting in the summer of 1969, which appellants suggest constituted the "agreement" for which they were prosecuted in Count One. The circumstances surrounding this meeting, however, show that rather than constituting the inception of the conspiracy it was simply an act in furtherance of an ongoing conspiracy. Captain Tange, it will be recalled was the Commanding Officer of the Headquarters District and was charged with the responsibilities for the administration of the S.I.U. He became aware, as appellants acknowledge (Br. 42), of the ongoing illegal activities of the S.I.U. teams, including the McClean team, and desired to share in the proceeds (1374).

Obviously, without Captain Tange's acquiescence it would have been impossible for appellants to continue their illegal activities. As Judge Weinstein observed: "It is obviously necessary or at least desirable to have the commanding officer of the unit part of the conspiracy in order to make it succeed" (1378). McClean, well aware of this, told Tange that he would be included in as "an equal partner" and assured Tange that "the team does not make a lot of scores; they were very careful, only looking for an occasional score where they would make money" (1374). Rather than constituting "the agreement", this conversation was admitted by Judge Weinstein to show a "conspiracy that existed" (1378).

Accordingly, what the Tange-McClean conversation shows is not an agreement to agree but an ongoing criminal conspiracy to violate the civil rights of citizens to be accomplished with minimum risk to the conspirators, and an overt act (the enlistment of Captain Tange) to insure that the illicit enterprise would succeed. Moreover, succeed it did with numerous scores carried out in similar fashion, with "silent partners", such as Captain Tange, sharing in the profits even though they may not have been aware of the identity of the victim or have been present at the scene.

In sum, the facts here plainly show a plot which contemplated "bringing to pass a continuous result" that could not have continued "without" the continuous cooperation of the conspirators to keep it up. Since there was, here, such "continuous cooperation", it is "a perversion of natural thought and natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one".[18] *United States* v. *Kissel*, 218 U.S. 601, 606, 607 (1910), Holmes, *J.*

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[18] The facts here are, indeed, stronger than those presented in the numerous narcotics conspiracy cases which rejected claims that multiple conspiracies, rather than a single conspiracy, have shown. See *United States* v. *Borelli*, 336 F.2d 376, 383 (2d Cir. 1964), *cert. denied* sub. nom, *Cinquegrano* v. *United States*, 379 U.S. 960 (1965); *United States* v. *Bynum*, 485 F.2d 490, 495-97 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 403 (1974); *United States* v. *Arroyo*, 494 F.2d 1316, 1318-1319 (2d Cir.), *cert. denied*, 421 Ed. 2d 51 (1974); *United States* v. *Sperling*, 506 F.2d 1326, 1340-43 (2d Cir. 1974). Unlike the instant case, these cases involved rather "loosely-knit" organizations with each member performing disparate narcotics-related functions. The appellants here were each involved in performing one particular function—the "scoring" of money from narcotics dealers. Unlike the aforementioned cases, the appellants here knew the full scope of the conspiracy and its boundaries.

2. Assuming that the evidence established a series of separate conspiracies, it is settled law that this does not automatically require reversal. "The true inquiry is not whether there has been such a variance in proof, but whether there has been such a variance as to 'effect the substantial rights' of the accused." *Berger* v. *United States*, 294 U.S. 78, 82 (1935); see, also, *United States* v. *Miley*, 513 F.2d 119 (2d Cir., 1975) and cases cited. There is no such prejudice here.

Appellants claim that it was "the single-conspiracy theory, for example, which, in large part, caused the trial court, over defense objections, to permit the introduction of testimony concerning: (1) the Calvo matter; (2) the Tange-Horigan conversation; (3) the Tange-McClean conversation; (4) the restaurant meeting at which Tange and Codelia were present; and (5) the two $500 to $1,000 payments to Tange." But this evidence would have been properly admissible even absent a single conspiracy (Br. 45).

The conversation involving Tange and Horigan, in which Tange told Horigan of his desire to be included in any illegal money that might be made by the S.I.U. unit (1376-1381), followed by a conversation between McClean and Tange, in which McClean indicated an awareness of the prior Tange-Horigan conversation and assured Tange that he would share in the proceeds of carefully planned scores (1384), the subsequent meeting between Tange, Codelia, McClean and others, in which the arrangement was further discussed (1385), as well as the payments to Tange, constituted evidence not only that the appellants were engaged in prior similar acts but of their intention to engage in such activities in the future and the motive for such conduct. Indeed, it is plain that Judge Weinstein admitted this evidence not only because of his finding that a single conspiracy existed, but because they were also admissible under

the prior similar act doctrine; for in setting out the authorities he relied on to admit this evidence he cited not only cases involving conspiracies, but prior similar act cases as well. See, e.g., *United States* v. *Deaton*, 381 F.2d 1145 (2d Cir. 1967); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir. 1975) cited at page 1356 of the transcript.[19]

Moreover, there are no serious hearsay problems; for the rule that the statements and acts of one conspirator is binding on all does not depend on formal charge of conspiracy. See, e.g. *United States* v. *Rinaldi*, 393 F.2d 97, 99 (2d Cir. 1967). Indeed, "the basis of admissibility is a joint enterprise, whether technically a 'conspiracy' or not." *United States* v. *Annunziato*, 293 F.2d 373, 380, N.Y. (2d Cir. 1961). Such evidence is admitted under a theory of agency. *Anderson* v. *United States*, 417 U.S. 211, 218-219, n. 6 (1974). Since here it is conceded that at very least the appellants agreed to commit a series of crimes when they could safely do so, declarations and acts of the parties in furtherance of that agreement, such as the very essential effort to insure Tange's acquiescence, are binding on all.

POINT IV

Counts Five through Seven did not lack the specificity required by Rule 7(c).

Counts Five through Seven charged that the appellants "wilfully, knowingly and unlawfully did intercept and endeavor to intercept by means and use of an electronic device, that is a telephone wiretap, wire communications" sent over a period of time alleged in each count, over a telephone located at an address specified in the indict-

[19] The same argument applies equally to the prior similar act revealed by the testimony of Mrs. Calvo (see, *infra*, p. 42).

ment. Appellants argue that the indictment was fatally vague for failing to allege "the nature of the illegality."[20] There is, of course, no claim that appellants were not aware that the illegality involved was wiretapping without a warrant, nor is there any claim that they were in any way prejudiced in preparing their defense.

Their claim under these circumstances, that Counts Five through Seven should have been dismissed, is without substance. "[T]his Circuit has consistently held that an indictment which tracks the statutory language and which provides the approximate time and place of the offense can be constitutionally sufficient". *United States* v. *Cohen*, 518 F.2d 727, 732 (2d Cir. 1975). As this court observed in *United States* v. *Tramunti*, 513 F.2d 1087, 1112 (2d Cir. 1975):

> "An indictment need only provide sufficient detail to assure against double jeopardy and state the elements of the offense charged, thereby apprising the defendant of what he must be prepared to meet. *United States* v. *Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974). Under this test, an indictment need do little more than track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime, *United States* v. *Fortunato*, 402 F.2d 79, 82 (2d Cir. 1968), *cert. denied*, 394 U.S. 933 (1969); *United States* v. *Palmiotti*, 254

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[20] Relegated to a footnote is one of many specious arguments found throughout the brief (Br. 48, n. 44). Appellants argue that the indictment failed to allege that appellants "knew of the illegality" in the wiretap. Since police officers may conduct "a wiretap which is illegal without knowing that it is illegal", the indictment allegedly failed to exclude this possibility. But, if the police officers do not know that they are acting illegally, then they are not engaging in "unlawful" conduct. The allegation that appellants acted "unlawfully" encompasses the allegation that they were aware of this illegality.

> F.2d 491, 495 (2d Cir. 1958), although in the case of a conspiracy it has been held that at least one overt act must be set forth."

So, for example, in *United States* v. *Palmiotti*, 254 F.2d 491 (2d Cir. 1958), an indictment, which tracked the language of the Hobbs Act and charged the defendants with extortion through the "wrongful use" of force, violence or fear, was not held defective for failing to detail specifically the "wrongful" conduct with which the defendants were charged. Similarly, in *United States* v. *Fortunato*, 402 F.2d 79, 81 (2d Cir. 1968), *certiorari denied*, 393 U.S. 933, an indictment which charged the defendant with "wilfully misapplying" bank funds was held sufficiently specific even though it did not detail the manner in which the funds were misapplied and why it was wrongful. Indeed, in *Hamling* v. *United States*, 418 U.S. 87, 118-119 (1974) the Supreme Court sustained an indictment charging a defendant with mailing "obscene" material where the indictment failed to allege the manner in which the materials were obscene. Accord: *United States* v. *Simmons*, 96 U.S. 360, 364 (1877).

These cases are clearly controlling here. Appellants do not allege that the indictment failed to allege an essential element of the offense with which they were charged; they argue only that the element properly alleged, that they "wilfully, knowingly and unlawfully" wiretapped, should have particularized more fully in what manner they acted unlawfully. But as these cases discussed above show, barring some showing of prejudice, the absence of such detailed specification is not fatal.[21] For, as the Supreme Court has observed, "[t]he sufficiency of the indictment is not a question whether it could have been more

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[21] See, also, *United States* v. *Carroll*, 332 F. Supp. 1299 (D.C. D.C., 1971) sustaining an indictment worded almost identically to this case.

definite and certain". *United States* v. *Debrow*, 346 U.S. 374, 378 (1953) [emphasis added]. This is so because "[t]he pleading provisions of the criminal rules cannot be viewed in isolation, but must be considered part of a coordinated system for the administration of criminal justice. Accordingly, if the indictment is otherwise sufficient, the court can take into account that particular facts needs in particular cases are obtainable by bills of particulars or discovery." *Wright, Federal Practice and Procedure*, (Criminal), § 126, p. 252.[22]

The particular facts needed in this case were provided prior to trial and there is no sound reason to reverse the judgments of conviction and direct that the indictment be dismissed. *Russell* v. *United States*, 369 U.S. 749 (1961), relied upon by appellants is plainly distinguishable from the instant case. There the indictment charged that the defendants, who were summoned to testify before a committee of Congress, refused to answer any questions "pertinent to the question under inquiry"; the indictment, however, failed to allege the subject under inquiry by the Committee and hence it was not possible to determine whether or how the questions were

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[22] This is also a sufficient answer to appellants claim that the Counts Five through Seven were fatally defective for failing to list the telephone number of the wiretapped phone and the person in whose name it is listed. Appellants claim that because a stated address may have contained numerous telephones they were not protected by the indictment from "a later indictment for tapping another phone at the same address" (Br. 48). Of course, appellants are not entitled to be protected from a later indictment for tapping "another phone" at the same address but only from another indictment for tapping the *same* phone. And a bill of particulars would clearly afford such protection. Moreover, since here the record is crystal clear as to whose telephones were tapped, even absent such particularization in the indictment, no court would sustain a subsequent indictment for wiretapping the same telephone. Cf. *Asher* v. *Swenson*, 397 U.S. 436 (1970); *United States* v. *Mallah*, 503 F.2d 971 (2d Cir. 1974).

in fact "pertinent." The Supreme Court held that this indictment was inadequate because (369 U.S. 764, 766):

> "Where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."
>
> * * * * *
>
> "A cryptic form of indictment *in cases of this kind* requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. * * * *And the unfairness and uncertainty which have characteristically infected criminal proceedings under this statute which were based upon indictments which failed to specify the subject under inquiry are illustrated by the cases in this Court we have already discussed.* The same uncertainty and unfairness are underscored by the records of the cases now before us" [Emphasis added].

These considerations are plainly inapposite here. The "chief issue" here is not undefined, it is simply whether the wiretapping here alleged was "expressly authorized" by statute (18 U.S.C. 2511), if it was not it was "unlawful". Moreover, the other instances of prejudice which were peculiar to a prosecution under the statute involved in *United States* v. *Russell*, *supra*, are obviously not present here.

POINT V

The speedy trial rules were not violated.

Appellants urge, as they did prior to trial, that the indictment should be dismissed because Rule 4 of the Eastern District's Plan for Achieving Prompt Disposition of Criminal Cases was not complied with. This claim is without substance and concededly contrary to the construction of Rule 4 in *United States* v. *Flores*, 501 F.2d 1536 (2d Cir. 1974).

The three appellants, together with Leslie Wolff and John Egan were first named in an indictment in the Eastern District on March 8, 1974 (74 Cr. 180). On May 6, 1974 this indictment was dismissed on the motion of the United States. On November 22, 1974 the three appellants, McClean, Viera and Codelia were indicted in the instant case. A notice of readiness was filed on December 4, 1974. At that point, if the time between the dismissal of the first indictment and the return of the second indictment is excluded, appellants had been under indictment for a period of approximately two and one-half months, and the notice of readiness was timely.

United States v. *Flores*, *supra*, makes it plain that the period between the dismissal of the first indictment and the return of the second indictment is excludable. It was held there that (509 F.2d 1359-1360):

> [F]or the period after the dismissal of the complaint against appellant and prior to appellant's indictment the clock should not run against [the Government]. During this period appellant was not subject to any of the disabilities of being un-

der arrest, the subject of a complaint or indictment, or in the midst of criminal prosecution.

That case is controlling here.[23]

POINT VI

The failure to disclose to the defendant Viera in advance of trial that a person who had been represented by Viera's counsel in a related proceeding was a probable witness did not prejudice appellant Viera.

1. One of the witnesses who testified for the United States with respect to a prior similar act was Mrs. Betty Calvo. She and her late husband were arrested by appellants McClean and Viera and the now deceased Detective Joseph Nunziata; the apartment was ransacked and approximately $20,000 was taken from the apartment. Mr. Calvo was told that, in return for signing a receipt—for $320, he would be given back his car keys and expensive jewelry (1334-1348). Several months after this incident Mrs. Calvo and her husband retained one Robert Lazarus, the attorney who represented appellant Viera, to represent them in the case arising out of the arrest. Mrs. Calvo ultimately pled guilty (1227, 1237, 1241).

Shortly before the commencement of the trial, after one witness disappeared and the other was killed, the Assistant United States Attorney decided to use Mrs. Calvo's testimony to show a prior similar act (1322). When it was

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[23] Appellant's contention that, since the original indictment was well publicized and the dismissal was not publicized, they were under some type of disability is frivolous. Clearly their legal status was unencumbered during the interim period. In fact, appellant Codelia remained in the New York Police Department at full pay until after his conviction.

disclosed, prior to her testimony, that Mrs. Calvo would be called, Mr. Lazarus, readily acknowledged that there was no real problem arising out of the attorney-client privilege which would impair his cross-examination (1238);[25] nor could there have been such a problem. The Assistant United States Attorney advised the district court that Mrs. Calvo was willing to waive the attorney-client privilege (1249) and, in fact, she not only did so when she took the witness stand (1320), but she acknowledged that it was Mr. Lazarus' obligation to cross-examine her harshly and readily assented to have him "exercise whatever powers on behalf of his present client" (1330).

In the face of this, Mr. Lazarus consistently maintained that he was still "inhibited from representing [Mr. Viera] to the best of my ability" (1318). No satisfactory explanation for this "inhibition" was ever put forth. The most explicit reason Mr. Lazarus could come up with, was that he was "fond" of Mrs. Calvo; that he "knew she had four children and has problems and [he] felt for her" (1250).

Unable to persuade Judge Weinstein that "fondness" for a witness would seriously inhibit his cross-examination of Mrs. Calvo, Mr. Lazarus then put Mr. Viera on the stand to testify that had he known of Mr. Lazarus' "inhibitions" regarding the cross-examination of one of his "chief-accusers" (hardly an accurate description of Mrs. Calvo), Mr. Viera would not have retained him (1318).[26]

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[25] As he told Judge Weinstein (1238):

"I have no recollection of this subject matter being the subject of my attorney-client relationship."

[26] This testimony began with the following colloquy (1318):

Q. Did I tell you that in view of my prior representation of the proposed witness, Betty Calvo — A. Yes.

Q. (continuing)—and her husband? A. Yes.

Q. (continuing)—that I felt in all candor — A. Yes.

[Footnote continued on following page]

After hearing this testimony, Judge Weinstein determined that no cross-examination of Mr. Viera was necessary (1320), and found that "there was no possible prejudice, even remote" arising out of Mrs. Calvo's prior relationship with Mr. Lazarus. Judge Weinstein continued (1324):

> There is no practical reason why this defendant should at all be disadvantaged. There is no ethical reason why this lawyer should not use all the information he obtained, agressively and fully. There is no reason in any of the cases—I won't cite them, but there are many of them in the Second Circuit—and there is no reason under the Code of Professional Responsibility why he should be inhibited. In point of fact, this defendant can only be advantaged by these circumstances.

Judge Weinstein then asked whether there were any applications. Mr. Lazarus promptly moved to exclude Mrs. Calvo's testimony; that motion was denied (1325). Judge Weinstein then asked whether Mr. Viera was moving to discharge Mr. Lazarus, and Mr. Viera responded that he was making no such motion (1326).

Having been unsuccessful in pursuading Judge Weinstein of the bona fides of his claim, and thus prevent the admission of Mrs. Calvo's testimony, Mr. Lazarus apparently decided to create the "prejudice" which was plainly absent, by not cross-examining Mrs. Calvo or referring to her in his summation. Of course, he did this knowing all along that his able co-counsel would subject Mrs. Calvo

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Q. (continuing)—that in some —

You don't have to answer, "Yes," just listen to me.

(continuing)—that I felt that in all candor that I might in some way be inhibited from representing you to the best of my ability because of an inhibition concerning her testimony in my cross-examination of her.

A. Yes, you did. You made it emphatically clear to me.

to a brutal cross-examination (1471-1505) and deal with her as well in his summation (1695-97).

2. The real issue presented here is whether the district court should, under circumstances described above, have excluded Mrs. Calvo's testimony. Quite plainly his ruling admitting that evidence was entirely proper given the feeble explanation offered by Mr. Lazarus for his "inability" to cross-examine her vigorously. Indeed, appellants do not and cannot challenge Judge Weinstein's finding that there was "no possible prejudice, even remote", arising out of Mr. Lazarus' prior representation of Mrs. Calvo. And, of course, even if it was error to have admitted such testimony that error was harmless. There was not only other compelling evidence of appellants' guilt, but Mr. Calvo testified only as to a prior similar act.[27] Moreover, Mrs. Calvo was vigorously cross-examined by appellants co-counsel and appellant here does not suggest what more Mr. Lazarus would have accomplished.

We acknowledge that the Assistant United States Attorney should have disclosed his intention to call Mrs. Calvo—if only to avoid the patently contrived argument below—even though Mrs. Calvo was prepared to waive any attorney client privilege and no hearing on this issue was necessary. See, *United States* v. *Alberti*, 470 F.2d 878 (2d Cir. 1972), *certiorari denied*, 411 U.S. 919 (1973). The failure to do so, however, was obviously inadvertent —there would be no reason to withhold the information. Indeed, if anything, it would be in the interest of prosecution to disqualify such an attorney. Accordingly, absent some showing of prejudice, there is no basis for ordering a new trial based solely on deliberate misconduct.

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[27] Any doubt on this score is eliminated by the fact that appellant Codelia was convicted on Counts One through Four (the Section 242 violations) even though he was not involved in the similar act to which Mrs. Calvo testified.

Nor do we believe that by characterizing the issue here as one involving an interference with the right to counsel of his choice, is respondent entitled to an automatic reversal—regardless of any showing of prejudice. First, appellant was represented by the counsel of his choice. If Mrs. Calvo's testimony was not admitted, he would have been perfectly content with Mr. Lazarus' representation. Accordingly, the prejudice to his asserted right to the counsel of his choice is obviously measurable in terms of the likely effect of Mrs. Calvo's testimony and Mr. Lazarus' "inhibitions". This is not a case like *Faretta* v. *California*, — U.S. —, 95 Sup. Ct. 2525, (June 30, 1975), upon which appellant relies, where the defendant was denied the right to represent himself at trial, and where prejudice must be presumed simply because it is impossible to measure it in terms of the effect on the trial.

This consideration aside, we do not—nor did the district court—accept the *bona fides* of appellants' claim. It was obviously a contrived effort to exclude Mrs. Calvo's testimony, and failing that to preserve an issue for appeal. The latter was accomplished by the deliberate choice of Mr. Lazarus (which must have been approved by Mr. Viera), to forgo cross-examination of Mrs. Calvo and not allude to her in his summation. What this court said in a related context [28] is equally apposite here:

> Though a defendant has a right to select his own counsel if he acts expeditiously to do so, *Releford* v. *United States*, 288 F.2d 298 (9 Cir. 1961), he may not use this right to play a "cat and mouse" game with the court, *Releford* v. *United States*, 309 F.2d 706 (9 Cir. 1962), or by ruse

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[28] *United States ex rel. Davis* v. *McMann*, 386 F.2d 611, 619 (2d Cir. 1967).

or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel.[29]

POINT VII

The evidence under Count Five was sufficient as to appellant Viera.

Appellant Viera argues that there was insufficient evidence to sustain a conviction on Count Five, the illegal wiretap of a telephone at 65-15 38th Avenue, Queens, in November, 1970. He contends that "the sole evidence" that was presented on this count was the testimony of Paul Stern, superintendent of the building and that Stern did not see Viera in the storage room where the wiretap was located. Appellants' argument is based upon an inaccurate reading of the record.

In November, 1970, Paul Stern noticed Detectives McClean, Viera, Codelia and Nunziata frequenting the lobby of the building. Subsequently, he ascertained their identity in a conversation with Viera (901-902). The appellants later advised him that they were conducting surveillance activities in Apartment 6Z (leased to Luis

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[29] Appellants McClean and Codelia also claim that they were prejudiced because Judge Weinstein allegedly refused to permit them to call Mr. Lazarus to the witness stand "to prove the absence of a fresh complaint" (Br. 67), by Mrs. Calvo to her lawyer. Aside from the fact that this evidence could have been elicited from Mrs. Calvo and, indeed, was elicited from her (1478-1480, 1492-1493), Mr. Lazarus made it plain that he did not represent Mrs. Calvo until long after the incident about which she testified (1227, 1229, 1237, 1241). It was in this context that Judge Weinstein observed that Mrs. Calvo's earlier attorneys would be the ones to ask about fresh complaints. "I don't think we need [Mr.] Lazarus for that point * * *" (1241).

Martinez). Some time thereafter they asked him if they could use a room as a base of operations. Stern allowed them to use the storage room (meter room) (903-904). Stern then noticed tape recording equipment in operation in the room connected to the telephone junctions (907-908).

Subsequent to the installation of the equipment, which he heard playing on one occasion, Stern observed *all* four officers, including Viera, entering and exiting the room (909-910). Moreover, in addition, the managing agent, Paul Sturm (not to be confused with Paul Stern), testified that he, too, saw Detectives McClean, Viera, Codelia and Nunziata *in* the storage (meter room) (1166-1168). He, also, had conversation with Detective Nunziata who advised him that "they had tape (sic), wire tape (sic) on the telephone" (1171).

There was thus evidence, contrary to appellants' claim, actually placing "Viera in the room" from which the wiretap was being conducted. Moreover, such evidence is hardly as critical as the appellant alleges. Viera's subsequent participation in the arrest (and shakedown) of Nicodemus Olate-Romero, an occupant of the apartment which contained the wiretapped telephone, his presence at the building during the tap, and the evidence of appellants' use of illegal wiretapping to aid them in finding "safe" scores (194-195, 203-204, 208),[30] constitutioned overwhelming evidence from which the jury could have found that he was involved in the illegal wiretapping alleged in Count Five.

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[30] Viera was not named as a defendant in Count Seven (the "Esparza-Lindquist" wiretap), upon which the other appellants were convicted, because he was transferred from the team at that time and did not visit the wiretap site. However, he was briefed regularly about this wiretap and was present when it was "covered-up" in Assistant District Attorney Hershey's office (265-266, 272).

CONCLUSION

The judgments of conviction should be affirmed.

Dated: October 29, 1975

Respectfully submitted,

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* We wish to acknowledge the assistance of Gregory J. Wallance, a third year student at Brooklyn Law School, in the preparation of this brief.

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EDWARD R. KORMAN being duly sworn,

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That on the 31st day of October 19 75 he served ~~a copy~~ two copies of the within

Brief for Appellee

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Sworn to before me this
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Olga S. Morgan

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Qualified in Kings County
Commission Expires March 30, 1977